IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1920.

No. 332.

Kern River Company, Pacific Light and Power Corporation, and Southern California Edison Company,
Appellants,

vs.

The United States of America.

BRIEF OF APPELLANTS.

STATEMENT.

This is an action in equity, begun by filing a bill seeking to forfeit the right-of-way obtained by the Kern River Company and its successors in interest, appellants, for certain rights-of-way across Government land under the Acts of March 3, 1891, 26 Stats. 1095, and May 11, 1898, 30 Stats. 405. The Kern River Company, hereinafter also called appellant, was organized

(under the laws of the state of Maine) for the purpose of "building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation, and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns situated in territory other than the state of Maine, and to acquire by purchase or otherwise buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power, and for any of the purposes or uses above mentioned, and to acquire or possess, contract for and sell, in the state of California and elsewhere than in the state of Maine, electric and other power for any purpose whatsoever."

At the filing of the first application for a right-of-way for a canal, etc., on or about the 3rd day of June, 1898, appellant Kern River Company filed with the proper officers of the government its articles of incorporation. The application filed consisted, among other things, of maps and surveys showing the definite loca-

tions of the proposed canal upon certain portions of the public domain. Thereafter the map was refiled by appellant on November 3, 1898. Appellant's endorsement upon the map stating that the right-of-way for said canal was desired solely for the purposes prescribed by the aforesaid acts. Thereafter on April 14, 1899, the Secretary of the Interior approved this map and application of appellant. The canal was thereafter constructed under the authorization so approved, but in the course of construction deviated to some extent from the map and profiles contained in the approved maps, and subsequently the appellant filed with the Government, after the completion of the canal, a map showing the final location of the canal along its exact line of construction.

The Kern River Company had obtained from its predecessor in interest, the Kern River and Los Angeles Electric Power Company, water rights to a considerable extent in Kern River which were deeded to it on July 17, 1897. These water rights are set out in full in the stipulation of facts [Rec. p. 34], as well as further rights acquired thereafter. Operation of the power plant began December 31, 1904. Prior thereto and on April 17, 1903, an action was begun in the Superior Court of Kern county by Miller & Lux *et al.* v. The Kern River Company *et al.*, to restrain the appellant from divert-

ing water from the Kern River. This suit was later transferred to the Federal Court, Southern District of California, and was numbered 56 Equity.

On March 24, 1904, another suit, No. 4739, was filed in the Superior Court of Kern county by Miller & Lux v. A. Brown Company, Kern River Company *et al.* A final decree was entered in the state court, set out in full as Exhibit 5 [Rec. pp. 48-60]. As a result of these suits, on December 23, 1904, the Kern River Company, through its president, entered into an agreement with Miller & Lux *et al.*, in which the company agreed that all water diverted by it in said canal should be used solely for the purpose of generating power, and for no other purpose. This agreement was incorporated in the final decree in suit No. 4739.

The amended definite location of the right-of-way for the canal under the Acts of March 3, 1891, and May 11, 1898, heretofore referred to, was filed on January 19, 1905, and refiled September 2, 1905. This was approved by the Secretary of the Interior November 27, 1905 [Rec. p. 36]. The Government land involved is described in paragraphs VI and XIV of the bill [Rec. pp. 3, 7]. A map showing the whole system is set out [Rec. p. 40]. This right-of-way has been used since the beginning of operations on December 31, 1904.

On March 12, 1908, the Secretary of Agriculture reported to the Secretary of the Interior that the Kern River Company was using its right-of-way for power purposes instead of irrigation, and on September 27, 1908, notice was served through the register and receiver of the Independence Land Office upon the Kern River Company to show cause within ninety days why suit should not be instituted to cancel said grants. The Kern River Company thereupon filed an answer in response to the notice to show cause. On November 12, 1909, the Secretary of the Interior decided (there having been no evidence introduced by either side) that the grant had been made for irrigation purposes and not for the development of electrical power, and on November 19th the Commissioner of the Land Office, pursuant to instructions of the Secretary of the Interior, gave the company sixty days' notice to amend the application filed June 19, 1905, to bring it within the Act of February 15, 1901 (31 Stats. 790). This the company failed to do, and the present action was filed in September, 1914.

Pending the application negotiations, and on July 29, 1905, the Commissioner of the General Land Office had addressed a letter to the register and receiver at Visalia, calling attention to the Kern River Company and stating that unless the canal, as shown by the amended survey of

the amended definite location, was desired for the purpose of irrigation only, the application could not be granted under the Act of March 3, 1891, but should be filed under the Act of February 15, 1901. This information was communicated to the Kern River Company [Rec. p. 37]. Thereupon the appellant refiled the map with the endorsed statement *"that the right-of-way herein described is desired for public purposes."* The act provided that a right-of-way might be obtained for public purposes, as well as for irrigation purposes, the pertinent sections of the act being hereinafter set forth. The letters passing between the Kern River Company and the Land Office are set forth [Rec. pp. 23 to 29].

The property of the appellant referred to consists of a canal or water conduit with a power house containing hydro-electric generating machinery and high power electric transmission lines. The canal takes water from the Kern River in a mountain valley in Kern county, with the intake of the canal in the northeast quarter of the southeast quarter of section 35, township 25 south, range 33 east, M. D. M., and extends along a side hill and along the Kern. River for a distance and then crosses the river and the valley and skirts the hills and returns to the riverside again, and thence along the river to the power house on the east half of the southwest

quarter of the southeast quarter of section 10, township 27 south, range 32 east, M. D. M., a distance from the head of the canal of about eleven miles. The power house site is known as Borel.

On the last described property is situated the hydro-electric generating house, plants and appurtenances, and this canal, with the generating plant, exclusive of the transmission line, cost about $1,935,000.

The equipment in the power house consists of four 3600 h. p. and one 3200 h. p. water wheels, operating under a static head of 262 feet, each wheel being directly connected to a 2000 k. w. 3-phase 50-cycle 2200-volt generator. The capacity of the generating plant in k. w. hours is 10,000, equal to 13,405 h. p.

The electricity generated is transmitted over pole lines consisting of poles and copper wires, with telephone lines used in the operation of the plant. The transmission line consists of two parallel pole lines, each pole line supporting one 60,000-volt 3-phase circuit, and one wholly metallic telephone circuit. The length of each pole line from power house to city of Los Angeles is 127 miles. The cost of the transmission lines and telephone lines was $1,064,000, making the total cost of said canal, electric generating plant and transmission lines $3,001,000.

The bill was brought against appellant, Kern River Company, on the ground that the right-of-way had been obtained by fraud and mis representation and upon the ground that appellant was using the right-of-way for purposes other than those under which it had been acquired, namely, for purposes other than irrigation or power purposes subsidiary to the main purpose of irrigation. There was no allegation in the bill that the right-of-way was not being used for purposes of a public nature.

The allegations of misrepresentation and fraud, as well as the allegations of misuser by the appellant, are set forth in the amended bill [Rec. pp. 3, 6, 7]. The answer of defendant Kern River Company to the amended bill is set out in full [Rec. pp. 13 to 33], putting in issue all allegations of fraud, misrepresentation and mistake, as well as allegations of misuser alleged in plaintiff's bill, and further setting out the statute of limitation and also laches as a bar to the action here brought. It is further alleged in appellant's answer [Rec. p. 22] that the Department of the Interior had at all times full knowledge of the purpose to use and of the use by this appellant of the said canal, electrical generating power house system, etc. The right of the plaintiff to sue without legislative authority is also put in issue by appellant's answer [Rec. p. 22].

The allegations of misrepresentation and fraud relied upon by plaintiff and from which all the other alleged conclusions are drawn, are:

(a) "That the right-of-way for said canal was desired solely for the purposes described in the aforesaid acts (March 3, 1891, and May 11, 1898)." [Paragraph 4 of the amended complaint, Rec. p. 3.]

(b) "That the right-of-way described on said map was desired for public purposes." [Paragraph 9 of amended complaint, Rec. p. 5.]

These are the only allegations of misrepresentation made in connection with the application for the right-of-way.

(c) "It is further alleged that these said representations were untrue and false in this—that the defendant did not intend to use said canal for irrigation or public purposes, but intended to use said canal solely for the purpose of generating electrical power for sale." [Paragraph 11, amended bill, Rec. p. 6.]

(d) "That the Secretary of the Interior being deceived by said false representations granted said application, and further that the approval of the said maps and applications were given by the Secretary of the Interior through a mistake, error and inadvertence, in the belief that said canal was to be used for the main purpose of irrigation, that the canal would be so used by the defendant, and there was attached to said grant implied conditions that said canal was to be used for the purpose of irrigation." [Paragraph 17 of the amended bill, Rec. p. 8.]

All of these allegations a, b, c and d were based upon, or rather are inference drawn by

the plaintiff from the first two (a and b) allegations of misrepresentation. All of these allegations were put in issue; except, that it was admitted that the first two, a and b, were true, as statements made on the accompanying applications, constituting the application for the right-of-way; and the manner in which the right-of-way was obtained is fully set forth in appellant's answer to the bill in the further, separate and second defense, paragraphs 1 to 8, inclusive [Rec. pp. 17 to 22].

The trial court, after considering all of the issues made by the pleadings and the evidence introduced on behalf of both parties to the cause, dismissed plaintiff's bill and filed separate conclusions. These latter conclusions are not in the record nor have they been printed, but the court passed upon all the issues tendered excepting the statute of limitations set up in paragraph second of the separate and third defense of defendant in its answer [Rec. p. 22]. The court had previously denied a motion to dismiss the bill for want of equity and for lack of jurisdiction because no legislative authority to sue was shown [Rec. pp. 12 and 13]. The court, evidently desiring to pass upon the merits of the case rather than dispose of it on said motion, on full hearing dismissed the bill as stated. The grounds of this motion

were preserved in defendant's answer and set up as a third separate defense [Rec. p. 38].

The trial court in dismissing the bill found that there was no fraud perpetrated on or misrepresentations made to the Department of the Interior in obtaining the right-of-way in question. It also found that in the absence of an express forfeiture clause in the law under which the grant was obtained, or of authority from Congress declaring a forfeiture, no right to sue for a forfeiture existed, but it did not pass specifically upon the question of the bar of the statute of limitations.

Specifications of Errors Relied On.

1.

The United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the United States Court for the Southern District of California, Northern Division, dismissing the bill of the United States and in ordering that a decree be entered in favor of the United States cancelling the orders approving the maps and location for the right-of-way of Kern River Company and in enjoining said company from further maintaining their canal on the forest reserve until said Kern River Company obtained a new permit authorizing the use of said right-of-way.

2.

The United States Circuit Court of Appeals erred in holding that the grant of the right-of-way to Kern River Company was obtained by fraud practiced by said company upon the Department of Interior or by mistake of said department, and in reversing the decision of the District Court holding that there was no fraud or mistake in obtaining said right-of-way.

3.

The United States Circuit Court erred in decreeing that a bill could be brought on behalf of the United States to cancel and annul said right-of-way without authority from Congress either in the act under which said right-of-way

was obtained, or in some other act of Congress giving the Attorney General authority to seek such a forfeiture and in reversing the decision of the United States District Court holding that a declaration of forfeiture by Congress, or authority from Congress to seek a forfeiture was prerequisite to such a suit.

4.

The United States Circuit Court erred in decreeing that said suit was not barred by the six-year statute of limitations contained in section 8 of the Act of March 3, 1891, 26 Stats., page 1099, being a portion of the act under which said right-of-way was obtained.

5.

The United States Circuit Court erred in decreeing that even though fraud or mistake had not been shown, the grant was void because the Secretary of Interior had exceeded his authority in affirming said grant of right-of-way.

6.

The United States Circuit Court erred in decreeing that an injunction against the continued use of the right-of-way by the Kern River Company was a proper remedy under the bill as brought.

7.

The United States Circuit Court erred in decreeing that the Kern River Company is operating and maintaining its canal over a forest reserve of the United States without the necessary permit from the Secretary of the Interior and without authority of law.

Main Propositions Discussed in Appellants' Argument.

In our argument discussing the questions here involved, we shall consider the following propositions:

1. The stipulated facts and reasonable inferences therefrom conclusively establish that there was no fraud perpetrated upon the Department of Interior in obtaining the right-of-way in question, or mistake by said department.

2. In the absence of an expressed forfeiture clause in the law under which the grant was obtained or of authority from Congress declaring a forfeiture no right to sue for a forfeiture exists.

3. The suit was barred by the statute of limitations contained in the act under which the grant was obtained.

4. The question of the Secretary of the Interior having exceeded his authority in approving the grant was not raised by the bill and therefore was not and is not an issue in the case.

5. The learned Circuit Court of Appeals in reversing the decree of the District Court erred in making unwarranted assumptions of fact and erred as to the law applicable thereto.

6. In the absence of a right of forfeiture of appellant's right-of-way an injunction against its further use, accomplishing substantially a forfeiture, is unwarranted.

7. The development of power to be sold to the public comes within the terms "Purposes of a Public Nature," contained in section 2 of the Act of May 11, 1898.

(In the appendix to this brief we have, we believe, printed all statutes in any way involved in this cause.)

ARGUMENT.

I.

The Stipulated Facts and Reasonable Inferences Therefrom, Conclusively Establish That There Was No Fraud Perpetrated Upon the Department of Interior in Obtaining the Right-of-Way in Question, or Mistake by Said Department.

It is appellant's contention that the stipulated facts, the letters passing between appellant and the Department of Interior and all other circumstances in connection with the negotiations pending the obtaining of the grant of right-of-way, establishes the fact that there was no fraud or misrepresentation perpetrated by appellant upon the Department of Interior. The Circuit Court in reversing the decree of the District Court refused to give weight to the judgment of the District Court as expressed in the opinion rendered by the District Court in dismissing the bill, in which opinion it was stated that there was no fraud practiced upon the Department of Interior.

While it is true, as stated by the Circuit Court, that most of the facts were stipulated to, nevertheless there was some oral testimony and the trial court necessarily was compelled to make all reasonable inferences from the facts agreed upon. And as these inferences

were in appellant's favor, as is shown by the dismissal of the bill, it is appellant's contention that so far as such conclusions of the trial court upon questions of fraud or mistake are concerned, they are entitled to great weight, if indeed they are not to be held conclusive upon appellate courts under well established rules in all classes of cases.

It is well settled in the federal courts, as well as in the state courts, that all presumptions are in favor of the correctness of the conclusion of the trial court and that a finding upon a question of fact will not be disturbed unless it is clearly apparent that there was no reasonable evidence upon which the finding could be based. Even if the evidence was conflicting upon such a question, nevertheless the conclusion of the trial court will be sustained unless such conclusion is clearly unwarranted from the evidence.

See:

Halsell v. Renfrow, 202 U. S. 287;

Chicago G. W. Ry. Co. v. Minn. Ry., 176 Fed. 237, 244.

The rule is well stated in 2 R. C. L., Sec. 173:

> "It is a well settled rule that the findings of the trial court where there is conflicting evidence will not be disturbed on appeal or writ of error. Superior appellate courts are of course primarily constituted for the purpose of dealing with questions of law.

> * * * These considerations have led the appellate courts to deal with finding of facts by a court as they would with the verdict of a jury. Following out these general principles, the question for the appellate court is, was there any evidence to sustain the conclusion reached in determining this question. The evidence in the record must be viewed most favorable to the appellee, and if as so considered there is any evidence to meet the requirements of the rule, the findings will not be disturbed."
>
> 2 R. C. L., Sec. 173. Appeal and Error.

The agreed statement of facts shows that the articles of incorporation of the Kern River Company expressly provided, among other purposes, for that of supplying and storing water for the operation of machinery for the generation and transmission of electric and other power, etc. These articles of incorporation were filed with the Government, together with the various maps and surveys called for in obtaining the right-of-way in question. The rights-of-way in question were obtained under the provisions of the Act of March 3, 1891, and of May 11, 1898.

There is no allegation in the bill that the Kern River Company was not using the right-of-way for purposes of a public nature, nor was there any evidence introduced upon this point, nor is there any allegation in the bill concerning the use to which appellant is now putting its right-of-way, other than an allegation that the Kern River Company is now using the right-of-way

for purposes of irrigation. There is no allegation in the bill that the Secretary of Interior did not have authority to grant a right-of-way to be used for purposes of a public nature.

A period of almost nine years elapsed between the final approval of the right-of-way on November 27, 1905, and the filing of the bill to forfeit the same on September 1, 1914. A second amended bill, the one here involved, was not filed until October 29, 1917.

Can it be said, looking at all of the facts in connection with the case, that the right-of-way was obtained by fraud, perpetrated upon the Department of Interior? Section 18 of the Act of March 3, 1891, provided:

> "Sec. 18. That the right-of-way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, that no such right-of-way shall be so located as to

> interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

The Act of May 11, 1898, provided as follows:

> "Sec. 2. That the rights-of-way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

These two sections must obviously be read and construed together. Section 2 of the Act of 1898, being a modification of the Act of March 3, 1891. Section 2 plainly provides for the acquirement of a right-of-way for two distinct, separate and independent purposes: First, for purposes of a public nature, and, second, for the development of power as subsidiary to the main

purpose of irrigation. The act does not define what is meant by purposes of a public nature, nor was there, so far as we have been able to discover, any statute of Congress or decision of the court which definitely defined what was meant or intended by the phrase "purposes of a public nature."

If power purposes used for operating public utilities as railways and lighting plants may not reasonably be said to be within this portion of the act, it seems difficult to understand what Congress could have meant by this portion of the act, one which was not contained in the prior Act of March 3, 1891. There no doubt may be, and are, many power projects which could not reasonably be said to be among "purposes of a public nature," and this, we believe to be the real reason of the retaining of the concluding phrase "for development of power as subsidiary to the main purpose of irrigation." This construction gives effect to all portions of Section 2 of the Act of 1898 and does so, we submit, without any inconsistency whatever.

In 1896, and therefore prior to the Act of 1898, and prior to the organization of the Kern River Company, a prospectus was issued by a predecessor company showing that it was the purpose of the new company to engage in the enterprises of irrigation and the generation of electrical energy, and to furnish and convey the

same to consumers as far south as Los Angeles, California. The record does not disclose whether the Department of Interior was then aware of this prospectus. There was, however, no evidence introduced to show the contrary.

Thereafter, and on September 24, 1897, the Kern River Company wrote to the Commissioner of the General Land Office, stating that the Kern River Company was organized for the purpose of irrigation and generation and transmission of electrical power, and requesting information concerning the method of acquiring a right-of-way across the Sierra Forest Reserve for its canals, etc.

On November 12, 1897, the Kern River Company forwarded its maps and plats to the Commissioner. This letter, accompanying the maps, again states the purpose of the company to engage in irrigation and power development purposes and applies for a right of way under the benefit of the Act of Congress of March 3, 1891. This application, it is important to notice, was prior to the Act of May 11, 1898, Sec. 2, providing for a right of way for "purposes of a public nature. The Commissioner of the General Land Office wrote the Register and Receiver of Visalia upon this subject, rejecting the maps so filed, on account of technical defects in the maps themselves. The articles of incorporation showing fully the purpose of the Kern River Company

had already been filed with the Department of Interior and on June 3, 1898, a further map was filed under the Act of March 3, 1891, and of May 11, 1898. On this map the Kern River Company certified, through its authorized officers, that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid acts. This certificate was made a short time after the Act of May 11, 1898, went into effect. The change of the form of certificate,—apparently because of the new act of May 11, 1898,—seems therefore perfectly reasonable and natural on the part of the Kern River Company, and to be entirely free from any inference of fraud on its part. The Secretary of the Interior endorsed his approval upon the same on April 14, 1899, thus consummating and completing the grant to the Kern River Company and thereafter and in 1902 construction was commenced by the Kern River Company.

Prior to this time the Kern River Company had acquired claims to certain rights entitling it to use the water thus acquired for irrigation and for the purpose of generating electric power. Thereafter and in December, 1904, in settlement of pending litigation between Miller & Lux and the Kern River Company, an agreement was entered into whereby the Kern River Company agreed that it would not use all its water for irrigation purposes and a decree embodying this

agreement was entered by the Superior Court of Kern county, California, enjoining the defendant from so using any water out of Kern River for irrigation.

On January 19, 1905, the Kern River Company filed its amended location under the Act of March 3, 1891, upon which appeared this representation: "That the company has in all things complied with the Act of Congress of March 3, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States." On July 29, 1905, the General Land Office Commissioner wrote to the Register and Receiver of Visalia concerning the map filed on January 19, 1905, as follows: "The company's attenion is called to the fact that unless the canal as shown by amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3, 1891 (26 Stats. 1095), under which it is filed, but should be filed under the Act of February 15, 1901 (31 Stats. 790), which grants a permission to use the right-of-way over the public lands for irrigation and other purposes."

The Kern River Company on September 2, 1905, refiled its amended map of location under the Acts of March 3, 1891, and May 11, 1898, with a second certificate containing this representation: "I further certify that the right-of-

way herein described is desired for public purposes." This amended location was necessary because of slight deviation in construction from the original maps as filed.

These then are the facts without any evidence being introduced on behalf of the United States as to any actual deception or mistake on the part of the Secretary of Interior upon which the United States Circuit Court reversed the finding and decree of the District Court and decreed that the right of way had been obtained by fraud and misrepresentation. It is difficult to see how it can possibly be said that there was any misrepresentation or fraud perpetrated upon the Department of Interior by either, or any, of the certificates upon the maps filed with the Department.

The certificate that the right of way was desired for public purposes was precisely in accordance with the provisions of section 2 of the Act of 1898, providing for such a purpose. It would be an unusual construction of language to say that this certificate, in accordance with the express provision of the statute, was a false certificate or that it could have been misunderstood by the Department of Interior. There was no suggestion on behalf of the Kern River Company as a fact that it intended to use the canals, reservoirs, etc., for the main purpose of irrigation, and not otherwise.

There is not, however, in the record, and the record fully sets forth all of the facts of the case, the slightest suggestion that the Kern River Company intended to use the canals for the sole purpose of irrigation, and it is plain that the Kern River Company did not suppress the fact that it did not intend to use exclusively the right-of-way for irrigation purposes. As shown by the testimony of Mr. Balch [Rec. pp. 63 to 65], when the application was first presented, the defendant did intend to use part of the water for irrigation purposes. It is clear that the Kern River Company at all times intended to engage in the enterprise of generating power and all representations made to the Secertary of Interior are consistent with that fact.

When the work was completed, the company filed its map of amended location, certifying that it had complied with the Act of March 3, 1891. It was then informed, by letter, that unless it intended to use the right-of-way solely for the purpose of irrigation, the maps could not be approved and the Department suggested to the defendant that application be made under the Act of February 15, 1901. The company apparently not being satisfied that it did not have the right to apply for its right-of-way under the Act of March 3, 1891, and of May 11, 1898, refiled the map with the endorsement thereon that the right-of-way herein de-

scribed is desired for public purposes, a use especially permitted under section 2 of the Act of May 11, 1898.

It is difficult to see how this certificate could be construed to mean anything else. It could certainly not be taken by the department to mean that the right-of-way was wanted solely for the purpose of irrigation. On November 27, 1905, the Secretary of Interior endorsed upon the last map the following: "Approved subject to all valid existing rights." This was a confirmation of the grant as then applied for and under the Act of Congress the title to the right-of-way became vested in the Kern River Company.

It is alleged in the bill that when the Secretary of Interior approved the first map on or about April 14, 1899, he believed and relied upon the representations made and further believed that said canal was to be used by the defendant for the main purpose of irrigation, and not otherwise. It is further alleged that when the Secretary of Interior on November 27, 1905, approved the second map, he believed and relied upon the representations so made by the appellant and believed that said canal was to be used by appellant Kern River Company for irrigation and public purposes, and not otherwise. *These allegations are entirely unsupported by any evidence introduced at the*

trial and must be supported, if at all, by virtue of the representations themselves. To so construe the representations, especially where actual fraud is alleged on the part of the Kern River Company would be an entire departure from the rule requiring that fraud and misrepresentation must be clearly proved.

We do not see how the Secretary of Interior could possibly have been deceived by these representations and endorsements upon the maps or from anything else that was proved in this case. The representations as made were perfectly plain and unequivocal. If it could possibly be said that the Secretary of Interior was insufficiently advised as to the intended use on the part of the Kern River Company, it certainly was his duty to so inform the company. It is apparent that the Secretary of Interior was alive to his duty for the reason that he had specifically pointed out to the company that if the right-of-way was not to be used solely for the purposes of irrigation, it could not be granted.

Notwithstanding these circumstances, the company declined to so certify and certified as above stated that the right-of-way was desired for public purposes, and upon this certificate the Secretary of Interior approved the map. Nor do the facts here presented support the conclusion that the Secretary of Interior had made

a mistake of fact. The same circumstances which show that the Secretary of Interior was not imposed upon establish the fact that the secretary at all times knew exactly what the company was doing and what it wished to do, and that no mistake of fact was made. We wish to again emphasize the fact that no proof was submitted to the court in support of the allegations of the bill in this regard other than what might be inferred from the facts as herein recited.

It is submitted that these facts would not justify the Secretary of Interior in believing that the canal was to be used for the main purpose of irrigation, and for this reason they could not establish the further fact, and one which should be supported by the clearest evidence, that the Kern River Company had perpetrated a fraud upon the Department of Interior.

Furthermore, the application of the Kern River Company for pole lines, etc., to be used in connection with this project was at this time before the Secretary of Interior. If the Secretary of Interior acted upon representations which might possibly be said to be too meagre, this itself is not sufficient ground for saying that the secretary believed something entirely different from what those representations actually were. There was no showing at the trial that the United States was unable to produce testimony from the then officers of the

Department of Interior as to what they believed when they approved the granting of the right of way. In the absence of such a showing, it seems only reasonable to assume that such testimony could not be produced, and that the officers of the Department of Interior would have shown by their testimony, if produced, that they fully understood the situation at the time of the granting of the right-of-way.

It was contended in the lower courts that the Department of Interior had no power to approve an application of a grant for purposes of a public nature. This issue was not raised at the trial court by the bill, nor was any suggestion in the bill that the Secretary of Interior was imposed upon concerning this matter, nor is there any allegation in the bill that the Kern River Company is not using the right-of-way for purposes of a public nature.

The entire theory of the bill, as shown by all its allegations, is unmistakably to the effect that the United States contended that the application was granted solely for irrigation purposes or for irrigation with the subsidiary purpose of development for power. If it was intended on behalf of the United States to present in this bill the question of fraud on behalf of the defendant in securing a right-of-way for a canal for purposes of a public nature, it certainly was the plain duty of the Attorney General to so allege and present

that issue. The bill alleges that the defendant is not using the right-of-way for irrigation, but it does not allege anywhere that the right-of-way is not used for purposes of a public nature; nor, as heretofore stated, is there any allegation in the bill concerning the use to which the company is putting the right-of-way. Elemental principals of pleading require that such an issue be presented with full opportunity of the company to rebut the same if it was desired to forfeit the right-of-way for that reason. (United States v. Safe Investment Gold Mining Co., 258 Fed. 872, 879; Wall v. Parrott Silver & Copper Co., 244 U. S. 407.)

It is too clear for argument that the proof on behalf of the Kern River Company and the preparation of its case might have been entirely different if such an issue had been fairly presented at the time of the trial. The same is true of the argument made and apparently acquiesced in by the learned United States Circuit Court that the Secretary of Interior misapprehended the law when he approved the application.

If this issue was deemed a material one, it should have been alleged and facts in support of it given in the bill. Undoubtedly when the Kern River Company made its application for a right-of-way for public purposes it meant that it desired that right of way for exactly those

purposes, and this was of necessity the conclusion of the trial court in view of the fact that the bill was dismissed. Undoubtedly the Secretary of the Interior was fully aware of the fact at the time of the final certificate that the defendant was desirous of taking advantage of that provision of the law authorizing a grant to be used for purposes of a public nature.

In any event, we believe it may fairly and safely be said that this issue was not tendered by the bill and that in view of the fact that section 2 of the Act of May 11, 1898, provided for the granting of a right-of-way for such a purpose prohibits a forfeiture of the right-of-way of the company without an issue upon this phase of the statute having been presented and determined. The trial court did not, and could not, under the issues as presented, have made a finding upon the question of the right-of-way not being used for purposes of a public nature, as heretofore stated. The opinion of the district court rendered February 10, 1919, in dismissing the bill, has not been officially printed, and for that reason we cannot refer this court to the full and convincing opinion rendered dismissing the bill.

Other than by rather vague allegations of misrepresentation and concealment contained in the bill, all of which are denied by appellant Kern River Company, it is submitted that there are no facts or circumstances from which any fraud

on the part of appellant can reasonably be inferred. There is no evidence of any sort that anyone connected with the Department of Interior was ever deceived as to the intended use of the right-of-way. It lay within the power of the plaintiff in support of the bill to produce evidence that the Department of Interior had been deceived or misunderstood the clear representations of appellant. One will look in vain for any misrepresentation, direct or indirect, on the part of appellant in obtaining the right-of-way.

Fraud is never presumed. On the contrary, fair dealing is the normal presumption and the burden of proving fraud or misrepresentation lies with the party alleging it. It cannot be assumed that merely because the form of the certificate by Kern River Company was changed to cover "purposes of a public nature" after the Act of May 11, 1898, became effective, that this of itself was any evidence of fraud on its part.

It seems immaterial, so far as any fraud or mistake is concerned, that in an earlier letter the department stated that the use under the Act of 1891 ought to be for irrigation purposes only. If on further correspondence and consideration, the Department of Interior thereafter changing its opinion issued a permit and made the grant upon the ground of its being certified for use for purposes of a public nature, it certainly cannot be said that this amounted, as a matter of

law, and as an irresistible inference from the facts, that fraud had been practiced upon the Department of Interior. *Especially is this true, in view of the fact that there is not a particle of evidence that anyone connected with the Department of Interior was ever deceived or ever failed to understand the use to which the appellant intended to put its rights of way.*. Fraud or mistake certainly requires evidence of a more substantial character to prove their existence with that degree of certainty which the law requires. The right of way was granted. It was used for many years. Finally it is decided that the Department of Interior could not have understood the plain purport of simple language and a bill is brought without authority of Congress to forfeit and prevent the use of the right-of-way which was lawfully, fairly and openly acquired.

The bill did not charge that appellant was not using the right of way for purposes of a public nature and this, it must be remembered, was the final certificate by the officers of the Kern River Company which the Department of Interior acted upon, and with which we must now assume they were satisfied after knowing the precise purpose for which the appellant intended its right-of-way. There is no evidence to the contrary and certainly the United States in a bill based on fraud and misrepresentation must meet

the burden of proof in a manner similar to any other party plaintiff.

Upon the most favorable view possible, the case on behalf of the United States made in the district court as disclosed by the record before this court falls far short of establishing a case of fraud or misrepresentation. It is stated in the opinion of the learned judge of the Circuit Court in reversing the decree of the District Court that the certificate of the Kern River Company that the right-of-way was intended for purposes of a public nature "was intended to and did convey to the department the impression that the right-of-way was authorized by the acts referred to, and was likewise false." With all due respect to the learned Circuit Court, it is submitted that there is no evidence, direct or indirect, in the record, or can any reasonable inference from the stipulated facts be made, which can be pointed at as supporting the conclusion there made. On the contrary, considering the vigilance of the Department of Interior shown by the correspondence between the parties, the evidence points unmistakably to the clear conclusion that the Department of Interior knew exactly what it was doing when it granted the right-of-way.

As we have heretofore stated, the bill of the United States in this action is based mainly upon the ground that fraud was perpetrated upon the Department of the Interior. Has then

fraud been proved in this case by that character and quantity of evidence which is required by courts in such cases? It is an elementary principal that fraud is never presumed but must be proved by the one alleging it. In the case of Farrar v. Churchill, 135 U. S. 609, an action in equity between individuals regarding the sale of land concerning which there was a claim of fraudulent representation, the court, upon the point of fraud, states:

> "The general principals applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material."

To the same effect is the case of Jones v. Simpson, 116 U. S. 609, where, in discussing the matter, this court states:

> "A further objection is made to the direction given by the court, 'that fraud is never presumed, but must be established by evidence.' Of the correctness of this proposition, or of its application to the case there should be no question; but counsel seemed to argue that the burden of proof was upon

> the plaintiff to show that he did not participate in the fraud now conceded to have been intended by the Howard Bros. Fraud is not so lightly imputed. While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof." * * * "As the trial court stated, 'the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same."

See also the case of United States v. Arrendonda, 6 Peters 691, at page 716.

It is also the well-settled rule that there is a presumption that a grant made as prescribed by law is valid. Peterson v. Jenks, 2 Peters, 216, where Chief Justice Marshall states the rule to be as follows:

> "In the case of Polk's Lessee v. Wend, 9 C. 87; 5 W. 293, this court decided that a grant raises a presumption that every prerequisite has been performed; consequently, that no negligence or omission of the officers of government anterior to its emanation can affect it."

The rule is the same even though the United States itself is the party plaintiff in an action to set aside grants or patents issued by its repre-

sentatives. In suits of such character the Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, and the presumptions of law and fact which attend suits by individuals. The burden is upon the Government to prove fraud by the most conclusive and convincing evidence in order to overcome the presumption which accompanies all patents and grants—that the grant or patent was made upon sufficient evidence and that the Government officials had complied with the law.

We quote at some length from the case of United States v. Iron Silver Mining Co., 128 U. S. 673, in which a bill in equity was brought by the United States against the Iron Silver Mining Company and others, to cancel two patents for alleged placer mining claims in Colorado. The bill for the cancellation of these patents alleged that they were obtained upon false and fraudulent representations that the land embraced by them was placer mining ground and contained no vein or lodes of quartz or other rock bearing gold or silver or other mineral and that the patentee had performed the work upon each tract required by law to enable him to enter it as a placer claim, whereas in fact the land was not placer mining ground but contained veins or lodes of quartz or other rock

bearing gold, silver and lead of great value, that all these facts were well known to the patentee on his application for the patent, and that the work required to enter the tracts as placer claims had never been performed. After stating that in actions of this sort the Government had the same right to demand a cancellation of a conveyance by the United States when obtained by false and fraudulent representations as a private individual under like circumstances, the court states:

> "In this respect the United States as a landed proprietor, stands upon the same footing with a private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof. In several cases recently before this court the character and degree of proof required to set aside a patent for land of the United States issued in due form by their officers, where they have had jurisdiction over the subject and have observed the various proceedings preliminary to its issue required by law, have been discussed and determined, and rules laid down which must control in future cases of the kind."
>
> "In Maxwell Land Grant Case, which was before us at October term, 1886, this question received careful consideration, 121 U. S. 325, 379, 381. The court there said,

by Mr. Justice Miller: 'The deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided.' And again, 'We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which

this is attempted are clearly stated and fully sustained by proof."

"In Colorado Coal Company v. United States, 123 U. S. 407, before us at October term, 1887, the same subject was considered, and a similar conclusion reached, as to the character and degree of proof necessary to invalidate a patent of the United States. There patents for coal lands were alleged to have been obtained on false and fraudulent papers made by the register and receiver of the local land office combining with others in a conspiracy for that purpose; but the court, after referring to the doctrine declared in Maxwell Land Grant Case, said, by Mr. Justice Matthews: 'It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.' Authorities are then cited to show that in some instances the burden of proving a negative rests upon the complaining party; and especially so where the negative allegation involves a charge of fraud against the party whose conduct is complained of, for which it is sought to defeat an estate."

Following this, the court discusses the evidence in the case and in summing it up states:

"We have gone over with great care all the testimony adduced by the government in

> the case; and our conclusion is that it wholly fails to substantiate the charges of false and fraudulent representations to obtain the patents, or of a conspiracy by the patentee and others to defraud the government. We perceive nothing in what was said or done by him, or by those who advised and assisted him, which justifies the imputations of the government upon his or their conduct."

The same rule was later enunciated with the citation of many supporting cases, by Mr. Justice Brewer in the case of United States v. Stinson, 197 U. S. 200, 49 Law. Edition, page 724, a suit brought in the Circuit Court of the United States for the Western District of Wisconsin to set aside and cancel patents for land on the ground that they had been acquired by false and fraudulent representations on the part of the patentee, Mr. Justice Brewer, in delivering the opinion of the court, states:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitations do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set

aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.), 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L ed. 182, 8 Sup. Ct. Rep. 131; United States v. San Jacinto Tin Co., 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. Des Moines Nav. & R. Co., 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; United States v. American Bell Teleph. Co., 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809.

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful. Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)' 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; United States v. Iron Silver Min. Co., 128 U. S. 673, 677, 32 L. ed. 571, 573, 9 Sup. Ct. Rep. 195; United States v. Des Moines Nav. & R. Co., 142 U. S. 510, 541, 35 L. ed. 1099, 1108, 12 Sup. Ct. Rep. 308."

In concluding its opinion the court states:

"Further, the circuit court, on its review of the testimony, found that there was no

> fraud, and decreed a dismissal, and that finding and decree were approved by the court of appeals. While such a finding is not conclusive upon this court, yet it is entitled to great consideration, and should not be disturbed unless plainly against the testimony."

In the above case, the action was brought in the first instance in the Circuit Court, which, therefore, was the trial court, and it was the decision of the trial court, also concurred in by the Court of Appeals, on the facts of fraud and misrepresentation which is given great weight. In this respect it is analogous to the case at bar in which the District Court, being the trial court, hearing the evidence, decided that no fraud or misrepresentation had been perpetrated upon the Government and dismissing the bill for that reason. The fact that the Circuit Court took a different view would not, we submit, change the rule.

The case of Moffatt v. United States, 112 U. S. 24, an action brought by the United States to cancel two patents for land in Colorado on the the ground that the patentees named were fictitious parties and that no settlement or improvement on the lands were ever made and that the documents alleging settlement and improvement were fabricated by the register and receiver of the land office of the district embracing the land covered by the patent, is entirely consistent with

the two cases heretofore cited. This case is discussed in the case of United States v. Iron Silver Mining Co., 128 U. S. 673, at page 678.

We submit that in view of the rule established by this court in numerous cases, expressed in the cases heretofore cited, that it will be found upon a careful examination of the record in the case, that there is no evidence of the character required in proof of the alleged fraud. As we have heretofore stated, there is no evidence or proof of any character that the land office officials were in fact deceived or that they ever misunderstood the intention or the purpose of the Kern River Company in its certifications upon the maps which were filed with the land office for approval. This proof is entirely wanting and is, it is submitted, indispensable in an action of this character based upon fraud, where fraud is not to be lightly presumed.

This situation was presented in the case of the United States v. Safe Investment Gold Mining Co., 258 Fed. 872, decided by the Circuit Court of Appeals, Eighth Circuit, May 19, 1919. The suit was brought to cancel, upon the ground of fraud, a patent issued by the United States covering certain lode mining claims, the fraud alleged being that false representations were knowingly made to the officers of the United States General Patent Office at the time of the application for the patent. Much testimony was

taken in the case and upon the trial the bill was dismissed upon the merits for want of equity.

The court first states the rules of law applicable to actions by the United States to cancel patents on the ground of fraud, quoting at length from the case of United States v. Stinson, 197 U. S. 200, heretofore cited and quoted in this brief to the effect that the United States, like every individual, must bear the burden of proof required in cases of fraud to overcome the presumption of the validity of grants and patents given by the Government. It was alleged in that case, in the plaintiff's bill, that the Government officials were deceived and believed and relied upon the false misrepresentations made by the patentee. In discussing the proof adduced upon this point, the court states:

> "The questions here are whether the representations actually made by the defendant were willfully and knowingly false, and whether those representations were relied upon by the plaintiff. A careful consideration of the whole evidence leads to the conclusion that plaintiff has failed to establish the allegations of the bill in respect to those matters. In view of plaintiff's contention, set forth above, as to the meaning to be placed upon the statements in the application, *it was incumbent upon plaintiff to prove that the statements made by Webb in the application were capable of but one meaning, viz., the meaning now placed upon them by plaintiff, or at least that this meaning was in fact intended by Webb, and that*

> *the statements were also understood with the same meaning by the officials of the General Land Office.* Conceding, without deciding, that both of the above-stated requirements, contended for by plaintiff, as to mineral value of the land were necessary prerequisites to the issuance of a patent, and that such requirements had not been met, still the fraud alleged lacks proof. First, there is no evidence that the officials of the Land Office believed that such requirements were necessary, or that the language of the application was intended to make such representations." (Italics are ours.)

This citation is squarely appropriate to the claims made in this case. That the Department of Interior was ever deceived can only be indirectly inferred from the evidence in the record. There is no direct testimony bearing upon this point and no facts, or inference from facts stipulated to or agreed upon, which are not equally susceptible to the view of a fair disclosure and full knowledge on the part of the land officers as to the purpose for which the right-of-way was acquired. The presumption in favor of the validity of a grant by the United States is not to be overcome, it is respectfully submitted, by the character of evidence shown in this case.

II.

In the Absence of an Express Forfeiture Clause in the Act Under Which the Grant Was Obtained, or of Authority From Congress Declaring a Forfeiture, No Right to Sue for a Forfeiture Exists.

As we have heretofore seen, the District Court found against the contention of the plaintiff in all respects, so far as any active or constructive fraud or mistake of fact was concerned in obtaining the right-of-way in question. We now wish to present to this court the further proposition which, if we are correct in our contention, would entirely dispose of the case before this court and require a reversal of the decree of the Circuit Court of Appeals. That proposition is, as suggested by the heading, that where the provisions of the act of Congress under which the right-of-way was obtained do not provide for a forfeiture such as is claimed by the United States, and Congress itself has not authorized any action for such forfeiture, none can be brought. At the outset it is very important to again look at the act in question. For the convenience of this court we shall set forth several sections of the acts in question:

Chapter 561. An Act to repeal timber-culture laws, and for other purposes. Approved March 3, 1891.

26 U. S. Stats., at L., 1095, 1101-3.

* * * * * * * *

"Sec. 18. That the right-of-way through the public lands and reservations of the United States *is hereby granted* to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, that no such right-of-way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon

the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for.

* * * * * * * *

"That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

Chapter 292. An Act to amend an act to permit the use of the right-of-way through public lands for tramroads, canals, and reservoirs, and for other purposes. Approved May 11, 1898.

30 U. S. Stats., at L., 404.

"Sec. 2. That the rights-of-way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to

> repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will be observed from an examination of these sections that the only provision for forfeiture is contained at the close of section 20, where it is provided

> "that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

The case, then, is vitally different from one in which the United States is seeking to enforce a forfeiture expressly provided for by Congress in the initial granting act, or by a special act of Congress after an alleged cause for forfeiture has come into existence. It is, of course, the position of appellant herein that no cause of forfeiture whatever exists, but regardless of the merits of that proposition it is our contention here that without express authority from Congress, either in the granting act or by subsequent provisions, no action for forfeiture will lie.

In the first place, it is well settled by the authorities that after the proper land officers have

approved the application, title passes and the land or right-of-way granted passes once for all beyond the power of the Secretary of the Interior or his successors to annul or revoke it for any cause whatever.

In the case of Noble v. Union River Logging R. R. Co., 147 U. S. 165, it was expressly held by the Supreme Court that a prior decision of the Secretary of the Interior in exercise of the powers conferred upon him by the Act of March 3, 1875, chapter 152, 18 Stat. 482, that a designated railway company is entitled to a right-of-way over public land, cannot be revoked by his successor in office, and further:

> "At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right-of-way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102. * * *

"We think the case under consideration falls within this latter class. The lands over which the right-of-way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right-of-way in the railroad company. The language of that section is 'that the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. Railway Company v. Alling, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose."

Noble v. Union River etc., 147 U. S. 156, 172, 176.

In the present case it is not only conceded but affirmatively alleged in the bill of complaint that the title to the right-of-way was granted or affirmed in the defendant company. In paragraph XI of the bill [Rec. p. 6], it is stated that on the 27th day of November, 1905, the Secretary of the Interior, "believing that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise, ap-

proved, subject to all valid existing rights, said application for said right-of-way for the canal"; further, "and by reason of the said approval of said application there was granted to the said Kern River Company a right to the use of the right-of-way in said application." It is further affirmatively alleged, at the close of paragraph IX [Rec. pp. 5, 6], "that construction was commenced on the 31st day of July, 1902, and completed on the 5th day of April, 1904."

In the somewhat earlier case of Moore v. Robbins, 96 U. S. 530, the Supreme Court of the United States held that a patent for public land, when issued by the land department acting within the scope of its authority and delivered to and accepted by the grantee, passes the legal title to the land, and all control of the executive department of the government over the title thereafter ceases.

> "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from

the executive department of the government. * * *

"But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. *It is a matter of course that, after this is done, neither the secretary or any other executive officer can entertain an appeal. He is absolutely without authority.*" (Italics are ours.)

Moore v. Robbins, 96 U. S. 530, 532, 533-534.

See also:

Beley v. Naphtaly, 169 U. S. 353-365.

It being thus established, both by the allegations in the bill and by the settled law, that the title to the right-of-way is now in the appellant and forever beyond the authority of the highest officers of the government in the land department to revoke it, it is difficult to see, in view of this doctrine, how an action such as is here brought can be successfully maintained without the authority of Congress, the sole granting power representing the United States.

As we have seen, there is no provision in the act under which the grant was obtained for a forfeit-

ure such as or similar to that claimed in the bill. As heretofore stated, the only provision for forfeiture pertains to the incompletion of the canal or ditch within five years after the location of the right-of-way. The purpose of this proviso is manifest. It clearly shows that the government was desirous of a speedy completion of the work in question; that its lands should not be needlessly withdrawn from the public and allowed to remain so while the work in question, which was deemed to be for the benefit of the public, was uncompleted.

Under the well-established rule of statutory construction, no other ground of forfeiture being mentioned in the act, all others are of necessity excluded. It is, of course, for the United States alone to determine what causes it deems a sufficient ground for forfeiture, and it is not within the authority of the Department of the Interior, through its officers, or even the judicial power of the courts, to read into the acts grounds for forfeiture which are not there specified. It is too well settled to require citation of authorities that forfeitures are not favored in law, much less in courts of equity. Conditions which are not expressed with the utmost preciseness and explicitly declared to be forfeitures are never construed as such. The act under which this right-of-way is alleged to have been acquired does not contain any provision what-

ever in relation to the right of forfeiture as claimed in this bill. A reading of the complete act conclusively establishes this position.

Assuming that any right of forfeiture exists in the government, it must be declared by the United States or someone on its behalf expressly given authority to do so. We have seen in the cases heretofore cited that all control over land granted passes from the hands of the Secretary of Interior and other land officers. The Congress of the United States is then the only body which can declare a forfeiture and order its enforcement through the proper channels in the courts. No claim is made in the bill that an act of Congress has declared a forfeiture in this case; certainly not for any grounds set out in the bill. The bill declares in paragraph XVIII that on the 27th of March, 1908,

"Plaintiff's then Secretary of the Interior, through the register and receiver of plaintiff's local land office, at said Independence, served notice upon said defendant Kern River Company to show cause within ninety days from date of said notice why proceedings should not be instituted to cancel said grants of right-of-way upon the ground that the same were secured by the approval of said maps for the main purpose of irrigation, but were used solely for power purposes."

That on November 18th, 1909, the assistant commissioner of plaintiff's general land office served a similar notice. There is then no state-

ment in the bill that Congress has ever declared a forfeiture or instructed, by proper legislation, its land office to proceed to enforce such a forfeiture.

We are not without express authorities upon this question from the Federal courts of the United States. The case which the District Court deemed to be conclusive upon this point was that of United States v. Washington Improvement and Development Company, 189 Fed. 674. In that case the various decisions of the courts, together with the opinions of attorney generals and acts of Congress upon the subject, were carefully and ably reviewed by Judge Rudkin.

The bill was one brought by the Attorney General of the United States seeking to forfeit the right-of-way acquired by the defendant company for non-completion and for failure to commence work within the time specified in the granting act. It was even expressly provided in section 5 of the act under which the right-of-way was obtained that the rights therein granted should be forfeited by the company unless at least twenty-five miles of the railroad should be constructed through the reservation within two years after the passage of the act.

The bill alleged the failure to comply with the provisions of the act, and, further, that the United States elects to forfeit all rights and

privileges granted under the act of Congress by reason of the failure on the part of defendants to comply with the terms thereof, and the prayer of the bill was that the rights and privileges granted to the defendants and each of them be declared forfeited to the United States. The defendants demurred to the bill on the ground "that said proceeding is instituted and said bill of complaint is filed without any lawful authority therefor."

We shall quote from the opinion of the court at some length because of the aptness of the authority and the careful and able discussion and opinion rendered in the case. As stated by the court:

> "The question is thus presented whether the United States may maintain a suit in equity to forfeit a land grant such as this for breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress, or express authority from Congress for the institution of such a proceeding." (Page 675.)

Further the court states:

> "But the question still remains, Has a right of action accrued in favor of the government under the facts set forth in the bill? The opinions of the different Attorneys General, the declarations of the Supreme Court of the United States, the legislation of Congress, and the practice of all departments of the government through a long series of years convince me that no such right exists." (Page 676.)

The court cites with approval the opinion of Attorney General Devens as follows:

> "'I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, *no action, by reason of its failure to perform the conditions, having been taken by authority of Congress.* It having, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and, until in some form advantage shall be taken of the breach of the conditions, *it would be the duty of the executive department to give it the benefit of the grant.*'" (Page 677.)

Further, from the opinion of Attorney General Garland, as follows:

> "'While it is very plain from the language of the grant that Congress intended to donate the land for the specific purpose designated therein, namely, to be used "as a site for the public building of said county," yet, whether this annexes a *condition* to the grant, or creates a mere *trust*, is not so clear. If a condition, upon breach thereof the grant would be liable to forfeiture. If a trust, the same result would not follow upon a breach, but the aid of a court of equity might be invoked by proper parties to effectuate the trust. * * * In the former case I submit that, in the absence of any law of Congress declaring the forfeiture or directing the institution of proceedings to that end, no authority exists to bring a suit in behalf of the United States to recover the land on the ground of failure to perform the condition.'" (Page 677.)

The court states further that:

> "While the Supreme Court of the United States has not passed upon this question as explicitly as we might wish, yet the language of the court in many decided cases is in entire harmony with the views of the Department of Justice. Thus in United States v. Repentigny, 5 Wall, 211, 268, the court said:
>
> " 'The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.' " (Page 678.)

The court cites with approval the case of St. Louis etc. Co. v. McGee, 115 U. S. 469, where this court said:

> "It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings *instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. * * * Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession.*" (Pages 678-79.) (Italics are ours.)

The case of United States v. Northern Pacific etc. Co., 177 U. S. 435, which will be later considered, is also cited, as well as many other similar cases.

The court next states that:

> "The legislation of Congress leads me to the same conclusion. That body has at all times acted in conformity with the opinions of the different Attorneys General, and has assumed that land grants can only be forfeited for breach of conditions subsequent by direct legislative act or by judicial proceedings expressly authorized by law." (Page 680.)

The court, in considering the question of forfeiture and its disfavor in courts of equity, quotes from the highest authorities

> "It is a significant fact that a court of equity could not decree a forfeiture, such as was declared by Congress in any of the instances cited, without express legislative authority therefor. That court has no legislative or dispensing power. It must administer justice according to fixed rules. It can only determine whether there has been a substantial breach of the conditions, and, if that fact is established, it must forfeit the grant in its entirety, unless Congress has ordained otherwise. In fact, it has been said by the highest authority that a court of equity will never lend its aid to enforce a forfeiture for breach of a condition subsequent. 'It is a universal rule in equity never to enforce either a penalty or forfeiture. Therefore courts of equity will never aid in the devesting of an estate for a breach of a covenant or a condition subsequent, although they will often interfere to prevent the devesting of an estate for a breach of a covenant or condition.' Story's Eq. Jur. (13th Ed.), Sec. 1319. 'It is a well-settled and familiar doc-

trine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture.' Pomeroy's Eq. Jur. (3d Ed.), Sec. 459. 'Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.' Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121. 'Equity abhors forfeitures, and will not lend its aid to enforce them.' Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 628, 25 L. Ed. 1030. 'Nor will the court be induced to depart from its uniform course, and take cognizance of that question because the jurisdiction is sought on the ground of removal of clouds from the title; for the right of the complainants to a dispersion of the cloud is dependent upon a favorable adjudication of the first proposition, *viz.*, that they are owners of the estate, by reason of a breach of the condition.' M. & C. R. R. Co. v. Neighbors, 51 Miss. 412. Whether the rule is stated too broadly by these authorities we need not inquire, for I am convinced that a court of equity will not lend its aid to enforce a forfeiture in a case such as this, in the absence of legislative authority defining its powers and prescribing the mode of their exercise." (Pages 680, 681.)

The language of the court in concluding is as follows:

"Conceding to the President and to the department of justice the full measure of

their constitutional authority, if I am correct in the conclusion that 'the mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government' (United States v. Repentigny, *supra*), that the forfeiture of a public grant must be asserted by legislative act, or 'by judicial proceedings authorized by law' (Schulenberg v. Harriman, *supra*), or 'through judicial proceedings instituted under authority of law for that purpose' (St. Louis etc. Ry. Co. v. McGee, *supra*), and that a bill which does not allege 'that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such intention,' fails to state a cause of action (United States v. N. P. R. R. Co., *supra*), *it must follow that until Congress acts there is no law for the President to execute or for the courts to administer.* I think the case is rather controlled by the provision of the Constitution which declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States (article 4, section 3). It is universally conceded that only the grantor or successors can take advantage of the breach of a condition subsequent, and, while in this case the government is nominally the grantor, the actual grantor is the Congress of the United States. And in my opinion a grant made by that body must remain of full force and effect until Congress ordains otherwise." (Italics are ours.)

United States v. Washington etc. Co., 189 Fed. 674, 682.

We have quoted at length from this case for the reason that we believe it is perhaps more convenient for this court, than to merely refer to the volume where the case was decided. It will be observed that the Washington case was a stronger one for permitting a forfeiture than is the case now before this court, for the reason that the act in question expressly provided that the right-of-way would be forfeited unless constructed within the time limited in the act. This important element is lacking in the present case. There was no contention that the appellant Kern River Company did not complete its improvements within the time required by the act. If, then, the courts do not feel justified in decreeing a forfeiture where the act itself expressly provides for such a forfeiture, how can it plausibly be contended that the Attorney General, from his own judgment as to a cause of forfeiture, has authority to proceed to attempt to attain it?

The case of United States v. Whitney, 176 Fed. 593, relied upon by the plaintiff at the argument before the District Court and before the Circuit Court, was considered in the later Washington case, and was disapproved of, but even in the Whitney case the forfeiture sought was one expressly provided for in the act under which the right-of-way was obtained, namely, section 20 of the Act of March 3, 1891. A

further decision in line with the Washington case is that of United States v. Tenn. & C. R. Co., 71 Fed. 71, where the court holds that the condition in the Act of June 3, 1856, granting public lands to the state of Alabama in aid of the construction of certain railroads, that if any one of said railroads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States, could only be enforced by congressional action. With regard to the right to declare and enforce a forfeiture, the court aptly states:

> If the government of the United States, through its legislative body, takes no action to enforce the condition in the granting act to these lands, then by what right or authority can this suit be maintained? If it be correct that the lands in question are not within the terms of the forfeiture act, then how is it shown that it ever was the purpose of Congress to insist on any forfeiture contained in any provision of the act? On the contrary, does it not show that no such purpose was ever entertained, because never put into execution by any legislative act? It may be, and indeed the language used in the forfeiture act cited *supra* indicates, that the lands in question may have been purposely excluded from the terms of that act, and who shall say that the Congress did not find ample reason why the construction of the railroad had been so long delayed, and why the forfeiture should not apply to it? Congress may have been influenced by the condition

of the country for a portion of the time between the passage of the granting act and the final completion of the road. The intervention of the recent war may have had an influence upon this legislation; but, whatever it may have been,—and the motive which influenced Congress is not open to question here,—*it is sufficient to say that, in the absence of congressional action as to the grant of these lands, there are no proper grounds upon which this bill can be maintained.* It is clear implication from the action of Congress in the forfeiture act, September 29, 1890, that the Congress did not intend to insist on any condition subsequent which existed in the granting act.

"It is to be noted in this connection that, at the date of the passage of the forfeiture act, the said railroad, as contemplated in the granting act from Guntersville, on the Tennessee River, to Gadsden, on the Coosa, was in process of construction, nearing completion, and was in fact completed, and in actual operation before this bill was filed." (Italics are ours.)

U. S. v. Tenn. etc. Co., 71 Fed. 71, 73-74.

There, as here, the work for which the right-of-way was obtained was completed and in actual operation before the bill was filed. In the often quoted case of Schulenberg v. Harriman, 21 Wall. 44, 62, the court states:

"The provision in the Act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed,

is no more than a provision that the grant shall be void if a condition subsequent be not performed." (P. 62.)

Citing from Sheppard's Touchstone, proceeding further the court declares:

"And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the Government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and

appropriation of the property, or that it be offered for sale or settlement."

Schulenberg v. Harriman, 21 Wall. 44, 63-64.

In our opinion, taken in connection with the statute under which the right-of-way in the case before this court was acquired, these authorities establish beyond question that a right to forfeiture, assuming that such a right exists, can only be declared by the United States through an Act of Congress or through legislation expressly authorizing a forfeiture to be enforced in the case in question. Without such, no authority exists in the Department of Interior or the Attorney General to declare and enforce such a forfeiture.

It is further to be noted in this connection that:

The bill shows that the Kern River Company entered upon the public domain and occupied the right-of-way and constructed its work thereon at great expense, and has used the property in serving the public since April, 1904, a period of almost nine years, as hereinafter stated in connection with the statute of limitations. All this time the Government has made no complaint through its officers or otherwise, and while we do not urge an estoppel *in pais*, in view of the decision in the case of United States v. Utah Power & Light Co., 243 U. S. 389, 61

L. E. 791, yet we consider that this case is fairly distinguishable from those cases in that the defendant companies in those cases were found *to be trespassers from the beginning*, and consequently were not in a position to evoke an estoppel or equitable claim of any kind, whereas the defendant here entered under claim of right and under a grant from the Secretary of Interior. It does appear by the bill (Amd. Bill, Par. XVIII) that the defendant was served with notice to appear before the Commissioner of the Land Office and show cause why proceedings should not be instituted to cancel the grant of the right-of-way, March 27th, 1908. Notwithstanding this notice the Government never brought a suit in relation to the right-of-way, until September 11th, 1914, when the original bill was filed.

The rule is that provisions in favor of forfeiture will be strictly construed even where the United States is seeking a forfeiture, and this is especially true where no material benefit is to be received by the Government in virtue of an enforced forfeiture. See:

United States v. Washington etc. Co., 189 Fed. 674,

heretofore quoted from at length.

If our position is correct as relating to forfeiture, and we are persuaded by the authorities that it is, then the grant vested the title to the

right-of-way in the Kern River Company and placed it beyond the control of the department. Then, as forfeitures are not favored, a liberal construction of the Act of March 3rd, 1891, should be given, and especially in view of the fact that the theory of the bill is an attempt to change the grant from an absolute grant of the right-of-way, conditioned only upon the construction of the works and the operation of the same to a limited right under the Act of February 15th, 1901 (31 U. S. Stats. at L. 790), under which the department grants rights-of-way for limited periods, and makes charge for the use of the portion of the public domain occupied.

Because of the wealth of authority cited and the general soundness of its conclusion, we believe that the reasoning of the Washington Improvement case is unanswerable. With Congress alone must rest the right to say when it shall declare and enforce such a forfeiture. We do not have here even the usual situation where the act itself provides for a forfeiture of the kind sought by the plaintiff. The fact that it does provide for other kinds of forfeitures is very persuasive that a forfeiture such as is sought by plaintiff was excluded. A forfeiture sought to be imposed long after the grant has become perfected and long after the work in question has been completed is very different from those forfeitures for failure to complete work within

a specified time. There the cause of forfeiture is made at the beginning of the relationship and before valuable rights have attached, and where no great inequity would result, and it is no doubt proper that the conditions should be strictly enforced.

This situation precisely illustrates the distinction between those classes of cases where the forfeiture is for the failure to complete the work in question within a time limit and cases similar to the present case and the Washington Improvement Company case. This court should not deny the United States through the Congress the right to consider the alleged misuser claim from its own equitable point of view, and if Congress itself does not attempt to enforce such a forfeiture, it should not be enforced. Congress alone should be looked to for a declaration of forfeiture.

The case of Union Land and Stock Company v. United States, 257 Fed. 635, relied upon by plantiff in the court below, is similar to the Whitney cases and is distinguishable from the present case, in that the act there in question expressly provided for a forfeiture and the forfeiture sought was within the class named in the act. We are not here contending that a grantor cannot forfeit a grant where it expressly provides for forfeiture for breach of conditions subsequent. If Congress itself had

declared a forfeiture for the alleged breach in question in this case, these authorities and such discussion would be relevant.

In the case of United States v. Oregon and C. R. Co., 186 Fed. 861, in which Congress made a grant of lands in Oregon and California, in aid of the construction of a railroad and telegraph line, a specified section of the road to be completed each year and the whole within a fixed time, and providing that if the company should fail to comply with its conditions by filing its assent, etc., the act should be null and void, the court dealt with the right of the Attorney General to bring an action. The condition of the construction within the time limited was held to be a condition subsequent. The authority of the Attorney General to bring the action was based upon a joint resolution of Congress of April 30, 1908, wherein the Attorney General of the United States was authorized to institute and prosecute any and all suits in equity, actions at law or other proceedings to enforce any rights or remedies of the United States growing out of either of said acts of Congress under which the lands were granted. Congress did not itself declare a forfeiture and expressly disclaimed any intention of prejudging the case before a decision was reached by the court, but as stated by the court, page 932:

> "But it is equally plain that it did authorize the Attorney General to institute such

> suit, action or proceeding as he might deem appropriate to determine the vital question as to whether a forfeiture has been incurred."

Again, page 933:

> "While Congress has not declared a forfeiture, leaving the judicial inquiry to force it has clothed the Attorney General with ample authority to institute a suit to determine whether forfeiture has been incurred or not and the action being such that equity may entertain jurisdiction of the cause there remains no reason why it should not be maintained."

On appeal to the United States Supreme Court the decision of the Circuit Court of Oregon was reversed in so far as it held that the provision requiring a sale of land to actual settlers at a maximum price and amounts was a condition subsequent for which the grant was forfeited. With regard to the resolution of Congress authorizing the Attorney General to prosecute the suit, the Supreme Court stated:

> "The Attorney General was empowered to assert all rights and remedies existing in favor of the United States," etc.

Further:

> "Being so authorized the United States brought this action as complainant against the Oregon and California Railroad Company."

It will thus be noted from the foregoing case that both the Circuit Court and the United

States Supreme Court emphasized the fact *that Congress by its joint resolution had authorized the Attorney General to enforce whatever rights of forfeiture the United States had in connection with the grant.* It is apparent that if Congress had believed that authority already rested in the Attorney General to seek such forfeiture, no such joint resolution would have been enacted. The fact that such a resolution was sought and obtained expressly empowering the Attorney General to sue indicate very clearly that Congress deemed such an authority necessary.

It is common for Congress in similar acts to expressly authorize the Attorney General to take the necessary steps to enforce a forfeiture which the United States is entitled to.

24 Stats. at L., page 556, chapter 376:

> "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes."

The act provides that if the land has, for any cause, been erroneously certified or patented, it shall be the duty of the Secretary of the Interior to demand from such grantee company a relinquishment or reconveyance to the United States of all such lands.

> "And if such company shall neglect or fail to so reconvey such lands to the United

> States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute, in the proper courts, the necessary proceedings to cancel all patents, certifications, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States."
>
> 24 Stats. at L., p. 637.

In this act, dealing with the forfeiture and escheat to the United States of property of corporations obtained or held in violation of an earlier act of the United States (12 Stats. at L. 501), forbidding the holding of property in excess of the value of fifty thousand dollars by religious corporations in any territory, it is expressly provided

> "that it shall be the duty of the Attorney General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section 3 of the act approved the 1st day of July, 1862," etc.
>
> 24 Stats. at L., p. 476.

This act restricts the ownership of real estate in the territories to American citizens, etc., and provides for a forfeiture for a violation of the statute. It is expressly made a duty of the Attorney General to enforce every such forfeiture by the proper proceeding, the wording of the statute on this point being as follows:

> "That all property acquired, held or owned in violation of the provisions of this act shall be forfeited to the United States, *and it shall be the duty of the Attorney General to enforce every such forfeiture by bill in equity, or other proper process.*" (Italics are ours.)
>
> 20 Stats. at L., p. 60.

This act deals with land grants to railway companies in aid of construction. It provides that if the railroads fail to perform the acts required, for a period of six months, such failure shall operate as a forfeiture (Sec. 11), "and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced."

Congress would not, of course, expressly authorize and empower the Attorney General to enforce such forfeiture if he had such right and power in the first instance. It clearly shows the purpose of Congress to alone control its right to declare forfeitures. We believe that such authority from Congress was equally necessary in the present case and without it the right of the plaintiff to sue has not been shown and that the decision of the trial court in this case with respect to this point must be affirmed.

III.

The Suit Was Barred by the Statute of Limitations Contained in the Act Under Which the Grant Was Obtained.

Section 8, Act of March 3, 1891, 26 Stats., page 1099, provides:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

At the outset of the discussion of our position here, it is important to note that this statute of limitations is a part of the same act under which the Kern River Company obtained its grant of the right-of-way sought to be annulled. It has been the contention of plaintiff that this statute of limitations did not apply to grants of right-of-way obtained for purposes of irrigation, or for purposes of a public nature. This view was followed by the Circuit Court. It is our contention that this act does expressly apply to the action here sought to be maintained, brought more than six years after the final application was approved, and furnishes an additional and independent reason why the decision of the trial court appealed from must be affirmed. The answer [Rec. p. 22, par. II] pleaded the statute of limitations. The trial

court was reluctant to dispose of the case upon the technical ground of the statute of limitations and for that reason preferred to base its decision upon the merits of the case, rather than on the statute of limitations. The act in question of March 3, 1891, 26 Stats. 1095, consists of twenty-four sections. Section 18 of the act provides for the acquirement of rights-of-way and is the one under which the Kern River Company applied for and obtained its grant. Section 8 of the same act contains the six-year statute of limitations provision above quoted. Section 20 of the act, so far as here material, provides:

> "That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals on the filing of the certificates and maps herein provided for."

In view of this express declaration that the provisions of this act apply to canals, ditches, or reservoirs, it seems conclusive to us that section 8, containing the statute of limitations, must apply to such canals, ditches and rights-of-way, otherwise section 20 is so limited as to make it a useless provision. An examination of the act is convincing proof that the claim of plaintiff that the statute of limitations only applies to a narrow field of patents where the

fee is conveyed is without foundation. This alone would seem to us ample ground for holding that the six-year statute of limitations applied to the suit brought by plaintiff in this case.

We are, however, not left to a mere examination of the act upon this question. We believe that the authorities bear out our position that the statute of limitations applies to this action brought more than six years after the application was finally approved and many more years after first obtained, and that it furnishes an additional reason upon which the decision of the trial court could have been placed. It was, of course, desirable that the merits of the question regarding fraud and mistake of fact should have been decided and we believe that the trial court was correct in preferring to base its decision upon the merits rather than upon the more technical defense of the statute of limitations. *It is also to be noted that this is a self imposed statute of limitations expressly made a part of the act under which the right of way was obtained,* and for that reason the general rule that statutes of limitations are not to be invoked against the United States does not apply.

In the case of United States against Chandler Dunbar Water Power Company, 209 U. S. p. 446, a bill in equity was brought by the

United States to remove a cloud from its alleged title to two islands between Lake Huron and Lake Superior. The defendant stood by the statute of limitations above set forth. On this point, Mr. Justice Holmes declared as follows:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of the opinion that now the patent must be assumed to be good. The statute referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. Ed. 789, 795, 17 Sup. Ct. Rep. 368. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect

> If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black 599, 17 L. Ed. 261."
>
> United States v. Chandler Dunbar Water Power Co., 209 U. S. pp. 449-450.

Thus it is seen that the only question to be determined is whether or not the land was public land of the United States, and open to sale and conveyance by the Land Department. The statute aims to perfect the title in the grantee whether the grant was void or merely voidable.

In the case of United States against The Puget Sound Traction, Light and Power Company, 215 Fed. 436, an action was commenced by the United States on February 9, 1914, seeking the cancellation of a patent to public lands issued to the defendant on June 30, 1904. The land in question was within the boundaries of the Washington National Forest and was alleged to be of great value as a water power site. The bill alleged many false representations as to the purpose and intended use contained in the application; that the Government officials believed the representations and relying on them issued its patent of June 30th, 1904. Subsequently to obtaining the grant, the defendants began the erection of a power plant upon the lands in question—a use entirely different from the mineral use contained in the applica-

tion. The defendants raised the statute of limitations, which has been set forth above. After stating the general rule, the court first states that the United States is not bound by state statutes of limitations, and declares that

> "the statute here in question was enacted for the very purpose of binding the Government. By its very terms it compels the Government to suffer by the negligence of its agents or officers. * * *
>
> "The policy of this statute, as of all statutes of limitations, was to prevent the bringing of actions when the evidence upon which they were based was impaired by time, and, for the sake of repose, to prevent the disturbance of claims to which time, at least, had given some sanctity. The statute would therefore accomplish very little of its object if it was held to apply only to cases where a discovery was made and no action was brought until six years thereafter. These would be only those cases where a breach of duty was committed by officials in failing to prosecute such actions, and it must be presumed that such cases would be few. The great bulk of cases for which this law was enacted would remain untouched. A new statute of limitations enacted by the court would be substituted for that enacted by Congress. The date would be changed from that of the issuance of the patent to that of discovery of the fraud, not in order to accomplish the presumed intent of the Legislature that an established rule of equity was incorporated therein, but regardless of such intent because no such rule as that con-

tended for has ever been established either in the courts of law or equity.

"I am therefore of the opinion that, when the Government is seeking to avoid the bar of a self-imposed statute of limitations, it must allege facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party, or that the fraud is of a self-concealing nature, and the failure to discover it was not due to negligence or want of diligence on the part of the Government."

United States v. Puget Sound Traction, Light and Power Co. *et al.*, 215 Fed. 436-443.

In the allegations in the bill in this case, nothing is alleged by way of concealment upon the part of the appellant in the use to which the right-of-way was put. There is no allegation that the facts were of a self-concealing nature. The case as it stands upon the bill and motion, comes clearly within the Puget Sound case above cited.

In the recent case of United States v. Morris, 222 Fed. p. 14, in a suit brought by the United States to cancel and set aside a patent issued by the Government to the defendant, after stating the general rule that the United States is now bound by state statutes of limitations, the court holds that the Act of March 3, 1891, hereinbefore quoted, was a bar to the action.

and states "this section in terms applies to all suits brought by the Government to vacate and annul patents to public lands issued under any law of the United States." And further:

> "There is neither allegation or proof of any concealment on the part of Rounds of his purchase of the property, nor of any fraud on his part to delay the commencement of the suit against him until the statute of limitations had run."
>
> 222 Fed. 14-19.

The court then cites and quotes from the case of United States v. Winona and St. Peter Railway Company, 165 U. S., at page 476, which case will be now considered. The last mentioned case of United States v. Winona and St. Peter Railway Company, 165 U. S. 463, was begun by a bill in equity filed by the United States seeking a forfeiture of unearned lands upon the ground of abandonment. Upon the question of the effect of the statute of limitations, Mr. Justice Brewer, after stating that in general the lapse of time would be no bar to such an action for the reason that statutes of limitations cannot be invoked against the Government, continued as follows:

> "But these sections are not all the legislation. Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Govern-

ment to insist upon the letter of the law in disregard to such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. *In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.*

"Thus, in the Act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. *Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department.*" (Italics are ours.)

United States v. Winona & St. Peter R. Co., 165 U. S. 463, 475-476.

As heretofore stated, it is plaintiff's contention that the grant here in question cannot be included within the words "any patent heretofore issued." Plaintiff has given an extremely limited definition of the word "patent." Strictly speaking, it is the mere document or symbol given to show the right or title which underlies it. A number of definitions of the word "patent" might be cited. In the case of United States v. Stone, 2 Wall. 525, 535, it is stated:

> "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."
>
> United States v. Stone, 2 Wall. 525, 535.

A patent is nothing more nor less than a deed from the state, and an innocent purchaser of land covered by a patent stands just as an innocent purchaser of land from one who holds title by deed.

> Nichols v. Commonwealth (Ky.), 64 S. W. 448, 450.

A patent is only another name for a land grant.

> State v. Harman, (W. V.), 50 S. E. 828, 830.

We believe, therefore, that it is clear that the word "patent" is simply a technical phrase applied to any deed or grant deed or any similar

instrument by which the Government conveys its title or any interest therein to an individual. It is in substance analogous in every particular to a common law deed or other conveyance of title, except that the Government is the granting party. There is no difference in substance, whether the conveyance from the Government is called a patent or a grant. Any distinction between the two would be of the most technical and unsubstantial nature.

In the Winona case, heretofore cited, it is apparent that the court had in mind that the statute of limitations here in question applied not only to patents, but to certifications as well. The Act of March 3, 1891, is distinctly referred to. The use of the words "certification" or "patent" twice used by Mr. Justice Brewer cannot be said to be an oversight upon his part. It is, then, we believe, a clear expression of opinion by the Supreme Court that section 8 of the statute of limitations in question should not be given the narrow construction contended for by the appellant.

In a later case in the same court, Louisiana v. Garfield, 211 U. S. 70, 76, Mr. Justice Holmes, in speaking of the Act of March 3, 1891, section 8, the act here in question, said:

> "The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. (Act March 3, 1891,

> C. 561, Sec. 8, Stats. 1099.) It may be that this act applies to approvals, when they are given the effect of patents, as well as to patents which alone are named."
>
> Louisiana v. Garfield, 211 U. S. 70, 76.

The court refuses, however, to finally decide this question in the case last referred to. The United States was not a party to the action, and the court refused to decide the question in the absence of the United States. This statement, taken in connection with the statement by the court in the Winona case, seems to us to establish the position which this court should now take upon this question, if indeed it has not already taken it.

The beneficial purpose intended by statutes of limitation should not be forgotten in connection with this point. The purpose underlying such statutes is well stated in the case of Wood v. Carpenter, 101 U. S. 135, 139, by Mr. Justice Swayne:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lis at their foundation. They stimulate to activity and banish negligence. While time is constantly destroying the elements of right, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit

> prescribed is itself a conclusive bar. The bane and the antidote go together."
>
> Wood v. Carpenter, 101 U. S. 135, 139.

The plaintiff in his brief in the Circuit Court quotes several cases to the effect that patents issued to Indian allottees do not come within the meaning of this statute of limitations, and actions are therefore not barred by it, citing United States v. La Roque, 239 U. S. 62, and Northern Pacific Ry. Co. v. United States, 227 U. S. 355. The reason why such patents are not within the act is obvious. The lands in question for which patents were issued were not the lands of the United States. For this reason it could never be said that a statute of limitation designed to run against the United States in its equitable right could affect trust lands held by the United States for the Indians. In the La Roque case the court said:

> "This trust patent was not issued for public lands of the United States, but for reserved Indian lands, to which the public land laws have no application."
>
> United States v. La Roque, 239 U. S. 62.

Further, in Northern Pacific Ry. Co. v. United States, 227 U. S. 355, 356, the sole question there was whether the lands patented were Government lands or were within the boundaries of Indian reservations:

> "There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States, and passed to the companies, respectively, under the Act of Congress and the patents issued in pursuance thereof."
>
> Northern Pac. Ry. Co. v. United States, 227 U. S. 355, 356.

Again, on page 366, it is said:

> "It must be borne in mind that the Indians had the prior right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud."
>
> Northern Pac. Ry. Co. v. United States, 227 U. S. 355, 356.

As before stated, the reason why the statute of limitations could not apply to such Indian lands is obvious, and affords not the slightest comfort to the plaintiff in the question before this court. The railroad cases cited to the Circuit Court by plaintiff on this question are clearly distinguishable, for the reason that the grants were not obtained under the Act of March 3, 1891, and therefore section 8 of this act might well be

said not to apply to such railroad rights-of-way. In the case before this court the *statute of limitations is an integral part of the act under which the grant was obtained.*

The Act of March 3, 1875 (18 Stats. 482), a railroad aid act, does not contain any statute of limitations, and therefore grants under that act would naturally not be subject to the statute of limitations contained in the act under which the defendant obtained its grant. Nor does the latter act include railroad grants.

Appellant's right-of-way was a direct grant *in presenti* by Act of Congress and is just as effective for all purposes as though evidenced by a patent. It is not a mere easement which can be terminated without authority of Congress, and appellant is entitled to benefit by the statute of limitations from any such attempt to render it ineffective as is here made.

IV.

The Question of the Secretary of the Interior Having Exceeded His Authority in Approving the Grant Was Not Raised by the Bill and Therefore Was Not and Is Not an Issue in the Case.

As we have heretofore stated, the bill for forfeiture was based entirely upon the theory of fraud and mistake. There is no allegation in the complaint that the secretary, or any other land officer, acted in excess of his authority under the law in approving the application for the right of way. Since no such issue was presented and since no evidence was introduced or attempted to have been introduced upon this issue, it seems apparent that the plaintiff should not now be permitted to urge this ground, regardless of its merits, before this court; but should be confined to the issue or issues presented by it in its amended bill.

In paragraph 17 [Rec. p. 8] the bill alleges:

> "That the approval of said Secretary of the Interior of the maps and application hereinbefore mentioned was given solely by reason of the facts alleged in paragraphs 3, 4, 5, 8 and 9 herein, through mistake, error and inadvertence in the belief that said canal was to be used for the main purpose of irrigation and that the canal would be so used by the defendant."

An examination of the paragraphs there mentioned will clearly show that no allegation either direct or indirect, is made to the claim that the secretary exceeded his authority or misunderstood the scope of the act under which the right of way was granted.

This issue now urged, which was not before the trial court, of excess of authority on the part of the Secretary of the Interior in misinterpreting the scope of the Act of Congress, is necessarily directly opposed to the theory of fraud and mistake upon which the bill was based. It presupposes a full knowledge on behalf of the land department and a misapplication of the law as applied to those facts.

It is therefore submitted that it cannot now be urged that even though the evidence did not establish fraud or mistake of fact, it nevertheless established a mistake of law on behalf of the land department or an excess of authority. This same contention was made on behalf of the United States in the case of

United States v. Safe Investment Gold Mining Co., 258 Federal (C. C. A.) 872,

heretofore cited, which was a suit to cancel a patent secured through fraud. It was there contended that if the evidence failed to prove fraud, it did establish that the patent was issued without authority in law because it was issued

upon insufficient evidence of a discovery of mineral. The court is disposing of this contention stated, page 879:

> "It is finally claimed by the plaintiff that, though the evidence fails to establish fraud, yet it establishes a mistake on the part of the Interior Department in issuing the patent, and that for this reason the patent should be canceled. It is sufficient to say, as to this contention, that no such issue is presented by the bill of complaint, and that, when a suit of this character is based upon fraud, the plaintiff will be confined, as a general rule, strictly to that issue. Eyre v. Potter, 15 How. 42, 55, 15 L. Ed. 592; French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed. 852; Wall v. Parrott Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215."
>
> United States v. Safe Investment Gold Mining Co., 258 Fed. 872, 879.

Among the cases there cited is that of Wall v. Parrot Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229, where Mr. Justice Clarke, rendering the opinion of this court, states, page....:

> "An examination of this record leads us to fully agree with the trial court in its conclusion that the appellants failed utterly to sustain their allegations that the property of the Parrot Company was fraudulently dissipated and depreciated through the management of the defendants prior to the sale, or that the sale made was in

any respect fraudulent. Upon this conclusion the judgment of the District Court might well be affirmed, *for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue.*" (Italics are ours.)

Wall v. Parrot Silver & Copper Co., 244 U. S. 407.

It is submitted, therefore, that the question of the secretary having exceeded his authority, due to a mistake of law, is not involved in this case.

V.

The Learned Circuit Court of Appeals in Reversing the Decree of the District Court Erred in Making Unwarranted Assumptions of Fact and Erred as to the Law Applicable Thereto.

The opinion of the Circuit Court of Appeals reversing the decree of the District Court [Rec. pp. 69-75] is based upon an assumption, we respectfully submit, not warranted by the facts. In paragraph 3 of the opinion [Rec. p. 74] in speaking of the first certificate of the company in the application for the right of way, it is said to have been made to overcome the objection made by the Commissioner of the General Land Office to the granting of the right of way. To overcome this objection (it is said), doubtless, the proper officers of the Power Company certified, "that the right-of-way for said canal was desired solely for the purposes described by the aforesaid acts (referring to the acts of 1898) was essentially and unqualifiedly false."

There is nothing in the record to justify such an inference or assumption that it was unqualifiedly false, or false at all, because the record shows [Rec. pp. 10-17] that the Power Company was organized both for the purpose of creating power and for supplying water for irrigation; and that it had a large quantity of

water intended to, and that could be, diverted to both such purposes. There was no concealment made at any time, and no representation that the right-of-way would be used, or was intended to be used, at the time the first application was made, for power purposes alone.

At the time the second application was made, after the completion of the canal, an amendment of the line of right-of-way was sought because of certain deviations made in the line owing to topographical difficulties met with during the process of construction. This was not a new right-of-way but simply the same right of way that had been approved in the beginning and because it was represented on this application for the amendment that the right-of-way was sought "for public purposes," that statement too was designated by the Circuit Court as being unqualifiedly false.

In the first place, it was based upon the language of the act under which the right-of-way was sought and therefore was not antagonistic to the act, nor could it be construed as any misrepresentation concerning it. But owing to certain litigation which was instituted by the Miller & Lux Company and others who claimed to have an easement in and control the water for irrigation of the entire river, many miles below the Power Company's works, litigation was commenced as in the statement already made,

in the Superior Court of Kern county, which was transferred to the Federal Court of the Ninth Circuit, and a subsequent action was brought in the Superior Court of Kern county, this litigation covering considerable time [Rec. p. 35], which may be inferred resulted in a contract of compromise which was entered into [Rec. pp. 42-60] whereby the Kern River Company waived its rights to use the water for irrigation and agreed to confine the use thereof to the generation of power alone. The company, until the compromise, held and intended to use a certain amount of water for irrigation after it had used the same for power purposes as shown by the testimony of the witness, A. C. Balch. [Rec. pp. 63-65.] His testimony also shows that the company acquired 3040 acres of riparian land through which the Kern River flows, for the purpose of acquiring the water rights appurtenant thereto and used thereon, and the idea of the company was to conserve the water of Kern River in the first place to supply water for the irrigation of lands in the Hot Springs Valley, through which part of the canal extends, the land being 60 to 70 feet and more in elevation above the river, and also to sell and dispose of the water conserved for water rights for irrigation below the canal. He illustrated the value of such water conservation by the experience of the company on the

San Gabriel River, so that from the testimony of Balch, who was an officer of the company and actively engaged in managing it prior to, and at the time of, the construction of the canal, the company had two objects in view, namely, to build the canal for power purposes and to supply water for irrigation to the Hot Springs Valley, and to conserve the water of the river so that it could be used for irrigation in the larger Kern Valley some distance below the power house site, and sold or disposed of as might seem best to the company.

This conservation of water is in accordance with the policy of, and is encouraged by, the laws of the state of California. (Burr v. Maclay Water Co., 154 Cal. 428, 436.) There is nothing in any of the acts of Congress referred to in this case which precludes a company organized for either power or irrigation purposes, or both, from selling or disposing of water and water rights for the purposes of irrigation, nor is there any prohibition against compromising or composing adverse claims. Therefore, this second assertion that the statement made from the law under which the right-of-way was sought, was unqualifiedly false is also an unwarrantable assumption. Therefore, it appears that the case turned in the Circuit Court of Appeals upon two assumptions of false statement not borne out by the record.

It is stated, but not in very definite terms, by the learned Circuit Court of Appeals [Rec. p. 74], that this remedy of injunction was

> "another ground upon which the jurisdiction of a court of equity may perhaps be sustained."

That court, however, in asserting that this remedy perhaps exists, assumes the whole point in question, namely, that the appellant acquired its right-of-way by fraud and for purposes other than the use to which it is being put, and that the use to which it is being put is not authorized by law. No authority is cited and no very persuasive argument is advanced in support of this conclusion. The statement of the learned Circuit Court may, perhaps, be justified if the whole case against appellant be assumed as an established fact, but we submit that otherwise it is unwarranted.

It, of course, does not make much difference either to the United States or to the Kern River Company what particular form of remedy is enforced. It is the question of the right to enforce any of these remedies which are requested in the bill that is of importance to both parties. For these reasons we do not see that the point suggested is helpful or is one upon which a decision upon the merits can turn, it being dependent on the right of the United States under the bill as brought to the relief mainly sought.

It is further stated in the opinion of the Circuit Court [Rec. p. 73], in answer to arguments and authorities cited in the brief of Kern River Company before that court, that the case is not one of forfeiture, but the

> "ordinary suit to set aside the approval of the Secretary of the Interior on the ground of fraud and mistake, like the familiar suits prosecuted every day to set aside patents obtained by similar means."

It is submitted that since the land, when selected and approved under the act became a completed grant (Noble v. Union River Logging Co., 147 U. S. 165), and the effect of setting aside the approval of the Secretary of the Interior on the ground of fraud or mistake, revokes or destroys appellant's right-of-way as effectively as it could possibly be done, it is, we repeat, in substance a forfeiture and to call it by any other name does not alter in the slightest degree the real substance of the case.

Furthermore, the case relied upon by the learned Circuit Court in support of this proposition is Noble v. Union River Logging Co., 147 U. S. 165, above referred to, in which the only point decided was that a successor in office could not revoke a grant of right-of-way given by a prior Secretary of the Interior and that the grant once given is final so far as the executive department of the government is concerned.

In the Noble case the court did state, page 176:

> "that if it were made to appear that the right-of-way had been obtained by fraud a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained."

But the court does not say that such a cancellation and annulment is not in effect a forfeiture, nor is it there stated that such a bill could be brought without authority of Congress, the grantor in this case, as is assumed by the Circuit Court.

The question here was not involved in the Noble case. That case, however, does decide that once the grant is given it ceases to be under the control of the executive department of the United States, and this of necessity seems to us to imply that a bill for cancellation or forfeiture could not be initiated even by any other department or officer of the government without the express authority of Congress for such action.

The Circuit Court of Appeals also cites the case of United States v. Poland, 251 U. S. 221, decided by this court January 5th, 1920, as authority for the proposition that in any event the action may be sustained regardless of fraud or mistake upon the ground that the Secretary of Interior in approving the grant exceeded his authority and that the validity of his approval may well be challenged in a suit of this kind.

We do not believe that the case of United States v. Poland is in point upon the situation here involved, nor does it sustain the proposition upon which it was cited.

In that case a bill was brought by the United States to cancel a patent for public land in Alaska, based on soldiers' additional homestead rights. A single body of land was granted larger than was authorized by the statute. Upon considering the question of the effect of the statute, this court decided that it did not permit a compact or single body of land, larger than 160 acres to be granted, and on this ground the patent was set aside. It is further to be noted that the bill for cancellation in the Poland case expressly alleged that the land officers in passing both applications to entry and patent acted upon a misconception of the law and their authority and that the patent for a larger single body of land was in violation of law and therefore should be cancelled. There is no such allegation in the bill in the instant case nor any allegation similar to it.

Upon the authorities heretofore cited it seems clear that in the absence of an issue raised by the bill a decree based thereon is unwarranted. In the Poland case the land officers were in error in interpreting the scope and meaning of the act granting the land and such a grant would therefore be just as voidable, if not void, as though

the land officers had attempted to issue a patent upon land not subject to patent.

The patents in the Poland case may have been issued by the land officers "with full knowledge of all the facts," as stated by the Circuit Court in its opinion [Rec. p. 75], but they were issued under a misconception of the scope of the granting act and the bill for cancellation expressly so alleged and raised the issue. It seems furthermore to have been the main question in the case.

A question of fraud was raised by the bill, but this court states that

> "this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary one-half mile in length."

This statement by this court in the Poland case is also peculiarly apt to the situation here involved. For, as we have heretofore urged, though fraud and mistake are alleged in the bill, the facts set forth in the bill in support of such fraud and mistake and as shown in the record under the stipulated facts, conclusively establish, we believe, that there was no fraud or mistake, and in the language of this court "do not

sustain the pleaders' conclusion as to what was represented."

We believe that upon careful consideration it will be seen that the learned Circuit Court of Appeals, in reversing the decree of the District Court, erred in making the assumption that fraud and mistake had been established—against the decision to the contrary by the trial court—and in basing its conclusion upon decisions of this court which do not sustain the conclusion reached by the Circuit Court.

VI.

In the Absence of a Right of Forfeiture of Appellant's Right of Way an Injunction Against Its Further Use, Accomplishing Substantially a Forfeiture, Is Unwarranted.

It seems hardly necessary to urge the proposition that if a forfeiture is unwarranted by the issues presented in the bill and the proof thereunder, an injunction against the continued use of appellant's right-of-way is improper. Equity dealing with the substance and not with the form will not, under the guise of one form of remedy accomplish that which is not justified by a direct proceeding, except in those exceptional cases where it is necessary to accomplish a just result. It is obvious that an injunction will, in substance, work a forfeiture when it deprives appellant of all beneficial use of the right-of-way in question. If a forfeiture itself is not justified by reason of a failure of proof of fraud or mistake, or if there is no authority on the part of the Attorney General to enforce a forfeiture without authority of Congress, or if the action is barred by the self-imposed statute of limitations, or for any other substantial reason, a forfeiture should not be granted, in either of these events an injunction against the continued use of the right-of-way by appellant would be unjustified.

VII.

The Development of Power to Be Sold to the Public Comes Fully Within the Terms "Purposes of a Public Nature" Contained in Sec. 2 of the Act of May 11, 1898.

This point has heretofore been suggested and we wish now to cite authorities in support of the proposition that the development of power for sale to the public is a use for purposes of a public nature.

In the case of Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Company, 240 U. S. 30, 60 Law Ed. page 507, a petition for a writ of prohibition to prevent the Probate Court of Tallapoosa county from taking jurisdiction of condemnation proceedings instituted by the Alabama Interstate Power Company was before this court for decision.

Mr. Justice Holmes, in delivering the opinion of this court, stated:

> "The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the power company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, *and sell to the public, power produced by water as a motive force.* In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of

eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is." (Italics are ours.)

A similar situation was presented in the case of Walker v. Shasta Power Co. ,160 Fed. 856, involving the right of the power company to institute condemnation proceedings, the question involved sufficiently appears from the portion of the opinion here quoted:

"The question first to be determined is whether the use for which condemnation is sought is a public use. Section 1238 of the Code of Civil Procedure of California makes provision for the exercise of the right of eminent domain in behalf of public uses, and enumerates among other public uses the following:

'Canals, reservoirs, dams, ditches, flumes, aequeducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting elecricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages and towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements

in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.'

There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the legislature intended that the right of eminent domain might be exercised."

* * * * * * * *

"And it has been generally held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use. Light & Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Hollister v. State, 9 Idaho 8, 71 Pac. 541; Grande Ronde Electrical Co .v. Drake, 46 Or. 243, 78 Pac. 1031; In re Niagara L. & O. Power Co. (Sup.), 97 N. Y. Supp. 853; Minnesota Canal & Power Co. v. Koochiching, 97 Minn. 429, 107 N. W. 405. In the case last cited the Supreme Court of Minnesota said:

'Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked.'

"In Light & Power Co. v. Hobbs, 72 N. H. 531-535, 58 Atl. 46, 66 L. R. A. 581, the court said

'Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires large capital to collect, store, and distribute it for general use. The cost depends largely upon the location of the power plant. A water

> power having a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain, or acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use similar in character to the use of land for collecting, storing, and distributing water for public needs—a use that is so manifestly public that it has been seldom questioned, and never denied.'"

The fact that the amendment of 1898 provides for the acquirement of a right of way for power purposes as subsidiary to irrigation is not conclusive that power purposes cannot, as a matter of law, as the Circuit Court seems to hold, come within the terms of the act providing for a right-of-way for "purposes of a public nature." The development of power is certainly of such a character as to come within the phrase "purposes of a public nature." In this particular case, as shown by the stipulated facts, a large percent of the power is in fact used for operating street railways and in lighting municipalities in various cities in Southern California, and yet the Circuit Court states, without apparently considering the question of what is, or what is not, a use for a public nature, that it can never be used for purposes of a public nature if the development of power is involved.

To so limit and narrow the meaning of the phrase "purposes of a public nature" was never intended, we believe, by Congress. It is difficult to see, as is stated by the authorities, what could be more in the nature of a public use than furnishing power to cities, street railways, and illuminating light for cities. Street railways are public service corporations and a necessary part of their operation is adequate electrical energy, and if any use of a right-of-way may reasonably be said to be for purposes of a public nature, it is submitted that such use is here found. Furthermore, the certificate of the Kern River Company upon which the Department of Interior acted, was that it was to be used for purposes of a public nature. This certificate was apparently satisfactory to the Department of Interior.

It was urged on behalf of the United States in its brief in the Circuit Court of Appeals, and will undoubtedly be urged here, that the United States was not actually attempting to forfeit the right-of-way of appellant, Kern River Company, in this action, but was merely insisting that the Kern River Company apply for and obtain a permit to use the right-of-way under the Act of February 15, 1901 (set out in appendix to this brief), but this it is submitted would be in substance a forfeiture of that which the Kern River Company has lawfully obtained under the act of

March 3, 1891, and the Act of May 11, 1898. Its present right-of-way is by way of a completed grant and gives to the Kern River Company a permanent and secure right-of-way, one which lends security to the company, to its stockholders and to the public.

The permit provided for under the Act of February 15, 1901, is revocable by the Secretary of Interior, or his successor, in his discretion, and does not confer any right or easement or interest in, to or over any public land, reservation, or park.

It is, therefore, submitted that to forfeit a grant of a permanent easement which is beyond the power of the Secretary of Interior or his successor, or any other executive officer of the government (Noble v. Union River Logging Co., 147 U. S. 165), and to compel the Kern River Company to apply for a revocable permit under an act which leaves them no redress or appeal if the same is revoked in the discretion of the then secretary, is in the fullest sense of the word a true forfeiture of appellant's vested right-of-way.

Conclusion.

In concluding our argument, we shall very briefly refer to the main points upon which we urge that the decree of the learned Circuit Court of Appeals be reversed:

First,—because a careful analysis of the facts concerning the application and the granting of the right-of-way establishes the fact that the decision of the trial court, holding that there was no fraud practiced upon the government in obtaining the grant, nor any mistake made by the Department of Interior in approving the various applications for the right-of-way was correct.

Second,—that the authorities established that without the sanction of an act or resolution of Congress or a provision for forfeiture in the act under which the grant was obtained, no right exists in the Attorney General *per se* to seek to enforce such a forfeiture or other remedy looking to the cancellation or interference with a grant solemnly given after careful consideration by the highest authorities of the Interior Department.

Third,—upon the ground that the remedy sought to be obtained is barred by the self-imposed statute of limitations made an integral part of the very act under which the defendant's right-of-way was obtained.

Fourth,—because the act itself was sufficiently broad to entitle the Kern River Company to a right-of-way for public purposes and there was no showing on behalf of the government that such a use was not being made of the right-of-way.

And, finally, for the reasons, arguments and authorities heretofore urged in this brief.

Upon each and all of these independent grounds we earnestly submit that this court should reverse the decree rendered by the learned Circuit Court of Appeals below.

Respectfully submitted,

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APPENDIX.

Extracts From the Statutes of the United States Relating to Water Rights and Rights of Way for Reservoirs and Canals Upon Public Lands and Reservations of the United States.

Chap. 561. An Act to Repeal Timber-Culture Laws, and for Other Purposes.

Approved March 3, 1891.

26 U. S. Stats., at L. 1095, 1101-3.

Sec. 18. That the right-of-way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right-of-way shall be so located as to interfere with the proper occupation by the Gov-

ernment of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, here-

tofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Sec. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right-of-way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

* * * * * * * *

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

Chap. 37. An Act to Permit the Use of the Right-of-Way Through the Public Lands for Tramroads, Canals and Reservoirs and for Other Purposes.

Approved January 21, 1895.

28 U. S. Stats. at L. 635.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right-of-way

through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business or mining or quarrying or of cutting timber and manufacturing lumber.

Chap. 179. A Act to Amend the Act Approved March Third, Eighteen Hundred and Ninety-one, Granting the Right-of-Way Upon the Public Lands for Reservoir and Canal Purposes.

Approved May 14, 1896.

29 U. S. Stats. at L., 120.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Act entitled "An Act to permit the use of the right-of-way through the public lands for tramroads, canals and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered,

under general regulations to be fixed by him, to permit the use of right-of-way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

Chap. 292. An Act to Amend an Act to Permit the Use of the Right-of-Way Through Public Lands for Tramroads, Canals, and Resrevoirs, and for Other Purposes.

Approved May 11, 1898.

30 U. S. Stat. at L., 404.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to permit the use of the right-of-way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right-of-way upon the public lands of the United States, not within limits of any park,

forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public and other beneficial uses.

"Sec. 2. That the rights-of-way for ditches, canals, or reservoirs, heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

Chap. 372. An Act Relating to Rights of Way Through Certain Parks, Reservations, and Other Public Lands.

Approved February 15, 1901.

31 U. S. Stats. at L., 790.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of

the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks

or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided, further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights-of-way for telegraph companies over the public domain: And Provided, further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.